BUILDING SAFETY LEVY

CONSULTATION RESPONSE

PREPARED AND SUBMITTED BY
Ian Fletcher
Director of Policy (Real Estate)
T: 020 7802 0112
E: ifletcher@bpf.org.uk

RESPONDENT'S DETAILS

- Your name: Ian Fletcher
- Your position (if applicable): Director of Policy (Real Estate)
- The name of organisation (if applicable): British Property Federation
- An address (including post-code) St Albans House, 5th Floor, Haymarket, London, SW1Y 4QX
- An email address: ifletcher@bpf.org.uk
- A contact telephone number: 020 7802 0112

INTRODUCTORY COMMENTS:

1. We welcome this further opportunity to comment on the design of the Building Safety Levy (BSL), and the considerable thought that has gone into considering the feedback from the first consultation (including our response) that ended in October 2021.

2. The primary issue for us in this second consultation is the treatment of the rental development community, which is not part of the leasehold sector, and therefore has no call on the Building Safety Fund, or other support.

3. It would be deeply unfair to charge the levy on rental property developers, given:

    - The Building Safety levy is limited to funding remediation of leasehold property and protecting leaseholders.

    - The Developer's pledge does not benefit rental property developers or building owners.

    - Without an exclusion, rental developers would therefore be significantly worse off:

i. Paying for their remediation. Most buildings in the Build-to-Rent (BtR) and Purpose-Built Student Accommodation (PBSA) sectors are high-rise and building owners are facing highly significant remediation costs, and in many cases, multi-year remediation programmes of their own.
ii. With no access to public funds or commitment from original contractors/developers to remediate buildings per the developer pledge.
iii. As well as paying the proposed levy.

4. This would be a penal position, even against those volume builders of low-rise housing, who argue they have played no part in the reason for needing a Building Safety Fund.

5. There are also good economic and social reasons for excluding the rental development sector from the levy.

6. Sectors, such as BtR and PBSA, derive their profit in a different way to a 'for-sale' housing development, where profit is delivered in the short-term on sale. In BtR and PBSA, development profits are not the driver of the businesses, but the long-term income derived from the ownership and operation of such buildings.

7. Many owner/operators of rental properties would be caught by the definition of 'developer' in this context, but are in fact investors who engage in development of new properties to hold completed assets for rental income rather than to sell and crystallise a development profit which is the business model of developer / traders (not investors). It is particularly unfair to treat owner/operators rental properties as developers in this context, as they do not profit from development itself. Development activity is in most cases an ancillary activity, to grow the portfolio, enabling them to serve more customers and thus grow rental income with cash profit only realised in the event of sale of an asset.

8. Now, is also not the time to be disincentivising rental development, as small landlords exit the sector and rents growing substantially, as supply in the private rented sector significantly outstrips demand. Development viability is also already highly constrained across the PBSA and BtR sectors due to rising cost of debt, a

difficult, slow and complex planning environment, and rising build costs. Application of the levy would constrain development further.

9. In PBSA, this is further manifesting itself in accommodation shortages, for example well-publicised examples of students having to be bused into their place of study, because they cannot find accommodation in cities like Durham, York, Bristol and Glasgow. This article explains more. There have also been lengthy queues in some student cities for 2nd and 3rd year accommodation. This in turn is putting pressure on other areas of the rental housing market, with potentially negative consequences for renters more generally as demand continues to outstrip supply.

10. [The purpose of the levy is stated to be to *'ensure that the burden of paying to fix historical building safety defects does not fall on leaseholders"* (section 15). PBSA owners have no leaseholders to pass remedial costs down to, and yet are just as affected by historical build defects. Façade and compartmentation defects are highly prevalent within the sector and owners are funding extensive remediation programmes across their portfolios and have incurred significant costs, without any government support and without passing any costs on to tenants. In many cases, buildings have had to be closed during remedial works, resulting in loss of rent, in addition to the remedial costs themselves. The costs and impact of remedial programmes will vary by provider, but for larger portfolios run to many millions and programmes are expected to be required to continue to run for several years from now given the extent of the issues.

11. The consultation talks further about the number of developers committed to remediation of defective cladding and that the levy is intended to 'pay for those buildings not covered by this commitment'. PBSA owner/operators have received no support from developers to remediate defects, but also have no access to funds from elsewhere and so are caught between the developer pledge and the government funding. Legal recourse to developers and contractors for building owners is extremely challenging and litigation is both costly and slow which means that building owners are funding the vast majority of the remedial costs themselves. We therefore believe that applying the levy to PBSA is inappropriate and effectively constitutes a double charge, whereby building owners are funding the costs of remediation of their portfolios, with little support from those who may

be deemed to be 'at fault' and no government support and yet are being asked to also fund remediation support for other parts of the real estate sector where the government has had to step in to support leaseholders.]

12. Including PBSA in the levy would also raise some complex challenges. Student accommodation comes in various shapes and forms – traditional halls, shared rooms, cluster flats, and studios. In PBSA, what will the charge be based on? If it is units, it would seem highly unfair to be charging a study bedroom in a traditional hall, or a cluster flat arrangement, the same charge as a private rented sector flat. If based on floor area, will this include communal space? Taxing communal space would seem folly to us, providing a disincentive to communal space provision, and therefore harming the student experience.

13. The same would be true in Build-to-Rent. Tenants gaining substantially from the provision of communal space, which is the sector's unique strength, and much appreciated by tenants.

14. Since the first consultation, we welcome a number of the modifications to the levy now being proposed. Localising the levy. Distinguishing between brownfield and greenfield sites. Basing it on floorspace. And seeking to mitigate the impact on affordable housing provision, are all sensible modifications to the levy, and bring it closer to CIL, as we suggested in our response to the first consultation.

QUESTIONS AND RESPONSES:

Question 1: Do you think the Building Safety Levy charge will impact on other charges made in relation to residential buildings including Community Infrastructure Levy and Section 106 payments or the Infrastructure Levy that will replace the existing system of developer contributions'? If so, what are they likely to be?

It is inevitable that a levy set at a meaningful rate will impact on the funds available for other developer contributions. Much will depend on the status of the land though. If land has already been purchased it will not reflect the cost of Building Safety Levy, and therefore will not be reflected in project appraisals. The impact will be to reduce what is available for other developer contributions, or to make the development unviable.

If the land has not been purchased, the cost of the levy should get reflected in the land price if there is a positive land value. The impact in those situations may be to make the seller of the land less willing to sell, but the development appraisal will not be affected.

It is also worth stressing that this is a levy targeted at residential development, but our members must compete in the land markets with non-residential uses, such as hotels. Also, with traditional build-for-sale house builders. If levied, rental developers will find it even more difficult to compete in land markets.

Question 2: Who do you think should act as the collection agency for the levy? Please give reasons for your answer.

Our understanding is that the Government would prefer the relevant building control body to be the collection agency. That could be the Building Safety Regulator (BSR), in the case of High-Rise Residential Buildings (HRRBs), or the relevant local authority building control function.

In the case of a building that is not an HRRB, it will be important that the system works where the project is using an approved inspector and where local building control has a minimal role.

We are also concerned that the BSR is going to have a lot to do in the next few years in establishing the new building safety regime, and question whether adding a collection agency function will divert it from its main task, to establish the new building safety regime.

Question 3: What proportion of receipts do you think the Collection Agency should retain? What administration costs will that need to cover?

We are not best placed to answer this question. We support local authorities being able to recover their costs, because otherwise there would an impact on other local services.

Question 4: How frequent should revenue returns be provided to DLUHC? Please give reasons for your answer.

Quarterly, as suggested in the consultation paper, seems eminently sensible.

Question 5: Do you think that there should be regular review points? If so, how frequent should they be?

We sympathise with the dilemma on this question. Viability can change very rapidly, and three years is long time to wait if economic circumstances are impacting on development activity, and the levy is set too high. On the other hand, we agree that developers would welcome some certainty on levy rates. We would suggest that the regular review is every three years, but that the Government should retain the power to change the levy at any time between those reviews, in a downward direction only, if circumstances change, and viability would suffer.

As we have previously set out, in development land deals negotiations are heavily based around consideration of the site's residual land value, which is entirely predicated on the consented development scheme and associated costs – including any s106, CIL or other policy costs. Should any of these factors be subject to change, the investment risk will be significantly increased. To remain viable, it is therefore important that developers know what costs they will pay upfront, and that should not change, otherwise it will impact on other provisions, such as affordable housing contributions agreed under s106.

Question 6: We welcome views on the two-step process and charging points for the levy. Do you agree or disagree, please give reasons?

We broadly agree with a two-step system. The one qualification we would make is that if a developer makes the first payment, and subsequently they do not commence the development, there should be a mechanism for a repayment of their levy payment.

Question 7: What are your views on the percentage split, i.e., charging 60% of the levy prior to commencement stage and 40% at final certification. Are these the right amounts? If not, why not – please give reasons.

A 60 per cent levy collected at the outset could have a significant impact upon project viability. This is due to the financing cost to developers, most of whom will not have the ability to make such payments from capital sums until the sale/occupation of completed units, or some considerable point in the future with rental accommodation.

We would suggest a 20/80 split, with 20% of the levy being collected prior to commencement and 80% at final certification. This would go some way towards mitigating the viability impact of the levy.

Question 8: If you consider yourself a small or medium enterprise, what impact will these levy payment points have on your ability to build? If so, what could help? To note we intend to exempt developments under 10 units or the square metre equivalent.

We are not placed to answer this question, as we do not represent smaller builders, but an exclusion for developments under 10 units would seem sensible. To avoid any gaming of this, a maximum floorspace limit for the exclusion could also be set.

Question 9: What do you think should be the principal sanction to ensure the levy is paid?

We broadly agree with the sanction of not achieving building control approval where there are discrepancies, or issues of non-payment. However, where there is disagreement over calculations, and an appeal is made, we believe that the development should be able to gain building control approval, subject to the outstanding levy amount being paid into some sort of escrow account arrangement, pending the appeal being heard. To deprive the appellant of access to building control sign-off tilts the scales of justice in favour of the collection body, because the costs of holding up the development to the developer will be significant.

Question 10: Do you think that the failures outlined above may occur in operation of the levy? If so, how best can they be avoided?

As we set out in Q11. we do not consider RPDT is a good comparator. BSL should be simpler, and lower in amount, and project-based, rather than organisation-based. A better comparator is CIL, and the sanctions in CIL should be the benchmark.

Question 11: Is it reasonable to consider the sanctions regime of the RPDT in relation to the levy?

We do not think that RPDT is the best comparator. RPDT is a relatively complex tax, based on a number of calculations that draw on corporation tax legislation. The BSL should be a relatively simple calculation, and the trigger points for paying the levy are clear, and the ultimate sanction, a lack of building approval, is quite a stiff penalty.

If the Department is looking for other sanctions, for example for miscalculation of the levy, failure to provide information, or late payment, a better comparator, and regime to draw on, is CIL.

Question 12: How might levy design avoid mistakes, gaming, and fraud, or else maximise positive incentives?

A possible design issue with excluding Build-to-Rent might be that developers could game the system by declaring the development as BtR and then flipping it to a for-sale development. Local authorities already deal with the issue with s106 arrangements,

which would provide for different contributions from BtR and for-sale developments. This is generally tackled through clawback arrangements. National planning guidance provides more details on clawback arrangements: https://www.gov.uk/guidance/build-to-rent. A similar, but simpler regime could be put in place for BtR that is flipped into for-sale use within a specific period, recovering the BSL payments that would have been due if BtR was not excluded.

Question 13: Which of the options above do you think is the best basis on which to implement the levy? Please give reasons for your answer.

We prefer option 2, a levy based on floorspace measured by sqm. We think that is fairer than a calculation based on units, as the size of the units may differ significantly and the levy would therefore be charged at the same rate for a penthouse, as for a studio flat.

As the consultation paper recognises, in those parts of country where the Community Infrastructure is charged it is based on floorspace and there is some logic to us in aligning the two.

As we have highlighted in our introductory remarks, there are parts of the sector that may be complex to levy. Purpose-Built Student Accommodation comes in lots of different forms. It would be grossly unfair to charge PBSA buildings on the basis of each study bedroom counting as a 'unit', and therefore presents another good reason to avoid a per unit methodology, although we think there are good social and other reasons why PBSA should be excluded.

If a floorspace methodology is pursued, however, one consequence for our sector might be levying communal space, providing a strong incentive to deliver less communal facilities. We think this would be a tragedy. What makes PBSA or BtR buildings special and enhances the experience of students or tenants, is communal space. Again, we think there are strong arguments to exclude both sectors from the levy, but if included, and option 2 is pursued, it should only cover the units used for individuals' living space, and not communal space.

Question 14: How best can we protect small and medium sized builders? Is exempting smaller developments the best way?

We support the suggestion that small developments (under 10 units) are excluded, to protect small businesses.

Question 15: Do you think government should set differential levy rates based on geography based on the different land values and house prices in different areas? Please give reasons.

We think having differential rates depending on place, is a good idea, and welcome this evolution in Government thinking since the prior consultation. Without rates based on geography, a single rate for the country would have widely different impact in different places.

Question 16: Which of the two options outlined above would you prefer? Please give your reasons for your answer.

We also support the Government's conclusion that the better option is option one, basing the levy on local, rather than regional rates. If Government is serious about being sensitive to different localities and their different development economics, and levelling-up, then the better option will always be to fine tune, locally, rather than regionally.

Question 17: Do you think there should be different levy rate applied on brownfield and greenfield developments in the same geographic area? If so, do you think that the differential should be the same in every geographic area?

We support a different levy rate for brownfield and greenfield development in the same geographic area. There are some areas of the country where the Community Infrastructure Levy is not charged, because land values simply cannot support CIL's impact on project viability. A simple, but effective policy design may be to simply exclude brownfield land from the levy in those areas.

Question 18: What amount of grace period should be set for projects that have already started the building control process on the date the levy goes live?

As we discussed in response to Question 1, the best policy design would be to only apply the levy to land that was bought after the levy was introduced. This would ensure that existing project viability was not impacted, and the levy was incorporated into future land values.

A second-best alternative would be a grace period of three-years, which is the grace period for a planning permission. Again, this would help ensure most existing projects did not have their viability compromised.

A further consideration is that the impact on projects may require developers to renegotiate s106 agreements. The Government will need to communicate to local

planning authorities that it is acceptable to renegotiate historical s106 agreements where they are compromised by the levy, perhaps through a written ministerial statement.

Question 19: What are your views on the above exclusions? Please set out whether you agree or disagree and give reasons for your answers.

We broadly support the list of exclusions.

Question 20: Do you have any views on Build to Rent developments, purpose-built student accommodation, older people's housing. If so, please set them out.

As set out in our introductory remarks there are strong arguments for an exclusion of the rental development sectors – Build-to-Rent, Purpose-Built Student Accommodation, and older peoples' housing.

Rental development communities are not part of the leasehold sector, and therefore have no call on the Building Safety Fund, or other support. They do not have leaseholders and are not seeking to pass the costs of remediation on to their customers - renters. As owners their responsibilities are clear, to remediate their buildings.

Rental developers would, however, face the most costs in building safety remediation: Paying for their remediation. Most buildings in the Build-to-Rent and Purpose-Built Student Accommodation sectors are high-rise. With no access to public funds. As well as paying the proposed levy, if they were not excluded.

This would be a penal position, even against those volume builders of low-rise housing, who argue they are not part of the building safety problem.

There are also good economic and social reasons for providing an exclusion for the rental development sectors.

These are relatively immature sectors that are still establishing themselves. As a benchmark of scale, the 8 largest housebuilders made £7bn of profit in 2020 and 2021. Over the same period, new investment (effectively turnover) in BtR was about the same £7bn.

The rental sectors also derive their profit in a different way to a 'for-sale' housing development, where profit is instant on sale. Development profits are not the driver of the businesses in rental development, but the long-term income derived from the ownership and operation of such buildings.

Now, is also not the time to be disincentivising rental development, with rents growing substantially, as supply in the private rented sector significantly outstrips demand.

In the PBSA, this is further manifesting itself in accommodation shortages, for example well-publicised examples of students having to be bused into their place of study, because they cannot find accommodation in cities like Durham, York, Bristol and Glasgow. Or joining lengthy queues for accommodation.

So far as PBSA is concerned, there are also issues of complexity in its inclusion in the levy. Student accommodation comes in various shapes and forms – traditional halls, shared rooms, cluster flats, and studios. In PBSA, what will the charge be based on? If it is units, it would seem highly unfair to be charging a study bedroom in a traditional hall, or a cluster flat arrangement, the same charge as a private rented sector flat. If based on floor area, will this include communal space? Taxing communal space would seem folly to us, providing a disincentive to communal space provision, and therefore harming the student experience.

The same would be true in Build-to-Rent. Tenants gaining substantially from the provision of communal space, which is the sector's unique strength, and much appreciated by tenants.

Older peoples' rental housing also comes in a variety of forms, as the recent changes being consulted on to the National Planning Policy Framework (NPPF) recognise. Again, this sector would face unfairness, if the BSL was defined in terms of 'units'. And again, it would be a retrograde step we think to disincentive the provision of communal space, if a 'floorspace' approach was taken.

The same arguments for excluding BtR and PBSA from the levy, also apply to housing-with-care Integrated Retirement Communities. It would make many developments unviable, given the specific additional costs of building communal facilities – gyms, restaurants – associated with this sector, as well as disincentivise the long-term financial

model of operators of these communities, which sees capital investment only recouped over a number of years, as opposed to when units are sold.

The government proposes to exempt buildings that represent community facilities from the Building Safety Levy. However, Integrated Retirement Communities represent important community facilities that deliver significant community benefit through shared spaces and facilities provided to both residents and non-residents.

Excluding care homes but not Integrated Retirement Communities would distort the social care system, at a time when there is already a massive under-supply of housing-with-care. It is not clear why developers and operators of CQC-regulated care homes should fall outside the Levy while developers and operators of CQC-regulated Integrated Retirement Communities should be included.

Any measure that increases the cost of developing older people's housing – and housing-with-care in particular - will reduce supply and increase costs for consumers, directly undermining the government's stated policy aims of boosting the supply of specialist housing for older people, including housing-with-care. The Levy would undermine the government's own intention to expand older people's housing via an updated National Planning Policy Framework and the Older People's Housing Task Force.

Question 21: Do you agree Affordable Homes should be excluded from payment of the levy?

Please give reasons for your answer.

The best and fairest way of excluding affordable housing would be to apply any exclusion to affordable housing, as defined in the glossary of the National Planning Policy Framework.

To this, however, we would want to see an additional exclusion if PBSA as a category is not excluded, which is 'affordable student' accommodation, as provided for and defined in the London Plan.

Question 22: Do you agree NHS Hospitals, NHS Medical homes, and NHS GP practices should be excluded from payment of the levy?

Please give reasons for your answer.

We agree. We would stress also that it should not matter who owns GP practices, so long as they are providing NHS Services.

Question 23: Do you agree Conversions, improvements to owner occupied homes and refurbishments should be excluded from payment of the Levy?

We agree, but exclusion on the basis of conversions, improvements, and refurbishments should apply regardless of tenure, and not just for 'owner-occupied homes'.

Question 24 to 29: Do you agree supported housing, care homes, children's homes, domestic abuse facilities, residential care homes, and criminal justice accommodation, should be excluded from payment of the levy?

We support all these exclusions.

Question 30: Do you agree military establishments be excluded from the levy?

Please give reasons for your answer.

We have no strong views on this, but think exclusion is sensible.

Question 31: Would excluding developments under 10 units (or the square metre equivalent) protect small and medium sized enterprises? What might the alternatives be?

We do not represent smaller developers, and so do not feel best qualified to comment. We support excluding developments under 10 units. One thing to consider will be the cliff edge this creates between delivering developments with nine units and 10 units. A phased threshold may be better.

Question 32: Do you consider that we should set a discounted levy rate for the entirety of a development where that development provides a specified proportion or affordable housing?

This has merit. It would be another way of ensuring that the impact of the levy on viability, did not lead to less affordable housing delivery. Please note, however, our response to question 21, and the definition of affordable housing.